

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

February 10, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 17, 2002
Case No.: TIA-0006

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits on behalf of her late father, XXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker, a uranium miner, was not a "DOE contractor employee" and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 7384l(1). Part A also provides federal monetary and medical benefits for uranium workers who received a benefit under the Radiation Exposure Control Act (RECA), 42 U.S.C. 2210 note. See 42 U.S.C. § 7384u.

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

1/ See www.eh.doe.gov/advocacy.

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

The application for assistance states that beginning at least as early as 1947, and ending in 1956, the worker was a uranium miner for various mining companies, including Vanadium Corp. of America, in Oak Springs, Arizona. The application further indicates that the worker became ill with lung disease as result of his work as a uranium miner. Finally, the application indicates that the worker received a \$100,000 RECA benefit.

The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee. See September 26, 2002 letter from the Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant does not directly address whether the employees of uranium mines were DOE contractor employees. Instead, she states that the uranium mining companies should compensate the uranium miners and their families under workers' compensation programs.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for those benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for those benefits without DOE assistance or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance
in Filing for State Workers' Compensation Benefits

As explained below, employees of uranium mining companies are not "DOE contractor employees." According, employees of uranium mining companies, such as the worker in this case, are not eligible for the DOE assistance program.

1. The Uranium Mining and Milling Industry

A 1982 DOE report describes the history of the uranium industry in the United States. See "Commingled Uranium-Tailings Study," DOE/DP-0011, vol. II (June 30, 1982), App. D ("History of the [Atomic Energy Commission] Domestic Uranium Concentrate Procurement Program") (hereinafter the 1982 DOE Report). The report concerns the fact that uranium mills sold uranium concentrate to both the federal government and other entities, and that the federal government was responsible for paying a share of the environmental remediation costs based on the amount of its purchases. By way of background, the report describes the development of the nation's uranium mining and milling industry.

The 1982 DOE report describes the period 1947 to 1970, when the DOE's predecessor, the Atomic Energy Commission (AEC), purchased uranium ore and concentrate from private firms. The report states that its first contract, executed in 1947, was for the purchase of uranium concentrate from Vanadium Corporation of American. The report indicates that, with the exception of a mill in Utah, the mines and mills were privately operated. ^{3/} In 1962, the AEC stopped purchasing uranium ore. 1982 DOE Report at D-4. Aside from the uranium procurement program, the AEC leased federal lands to private firms in exchange for a royalty

^{3/} The AEC purchased a Monticello, Utah mill in 1948. 1982 DOE Report at D-6.

share of any production. In 1962, the AEC discontinued the leasing program. 1982 DOE Report at D-7.

2. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

An individual who is or was employed at a Department of Energy facility by -

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and

(B) with regard to which the Department of Energy has or had -

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and

integration, environmental remediation services,
construction or maintenance services.

42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Although the DOE's published list of DOE facilities does not include any uranium mining or milling sites, 67 Fed. Reg. 79,069-79,074, those sites would be DOE facilities if they met the statutory and regulatory definition.

The 1982 DOE Report indicates that, with the possible exception of employees at the AEC's Utah mill, uranium mine and mill workers were not "DOE contractor employees." In order to be a DOE contractor employee, the employee must work for a firm that has a contract to provide "management and operating, management and integration, environmental remediation," or other "services" at a DOE facility. Neither the AEC procurement contracts, such as the one with Vanadium Corporation of America, nor the AEC mine leases required the contractor to provide services. Under the AEC procurement contracts, the contractor sold product to the AEC. Under the mine leases, the contractor paid a royalty-in-kind on ore production in exchange for a leasehold interest. Since the AEC procurement contracts and the leases were not contracts for services, the firms that entered into those contracts did not have the type of contracts that would make them DOE contractors, let alone contractors performing work at a DOE facility. Accordingly, their workers, including the worker in this case, do not meet the definition of a "DOE contractor employee."

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0006 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 10, 2003